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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-633

HORACIO QUINONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App.) is reported at 503 F. 2d 710.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 1974 (Pet. App. 17a–18a). A petition for rehearing was denied on October 23, 1974 (Pet. App. 19a–22a). The petition for a writ of certiorari was filed on November 22, 1974. The jurisdiction of this Court has been invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence introduced at trial was sufficient to support petitioner's conviction.

2. Whether the trial court erred in admitting testi-

mony regarding conversations between petitioner and a co-conspirator without requiring the translator to appear as a witness.

3. Whether evidence of a criminal transaction not specifically alleged in the indictment was properly admitted.

4. Whether certain incriminating statements made by petitioner to the prosecuting attorney were properly admitted.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiring to buy, sell and transport narcotic drugs, in violation of 21 U.S.C. (1964 ed.) 173 and 174. He was sentenced to a term of five years' imprisonment. The court of appeals affirmed (Pet. App.).

Petitioner was convicted for his role in an international narcotics conspiracy involving over a three and one-half year period the purchase of large quantities of heroin from suppliers in France and the subsequent importation of the heroin into the United States for sale and distribution. The central figures in the operation were Edouard Rimbaud, a French seller of narcotics, and Antonio Flores, an American buyer. The Rimbaud-Flores operation began in 1968, when it was formed through the efforts of Joseph Lucarotti. When informed that Lucarotti had a buyer for heroin, Rimbaud agreed to supply the narcotics from an undisclosed source (Tr. 101–105).[1]

[1] "Tr." refers to the transcript of the trial. "H." refers to the transcript of the pretrial suppression hearing.

In July 1968, Rimbaud traveled to Montreal to negotiate the details of the smuggling scheme with the wife of a Lucarotti associate (Ralph Santana, a co-defendant). At the conclusion of these negotiations, Rimbaud was given $16,000 to finance the purchase of heroin in France. He returned to France with the money and purchased a quantity of heroin, but the initial attempt to ship the heroin from France to Montreal was aborted (Tr. 106–116). Thereafter, Flores arrived in France personally to supervise the smuggling operation (Tr. 116–123, 579–581).

The Rimbaud-Flores operation functioned successfully until March 1969, when Rimbaud was arrested in connection with an unrelated narcotics scheme. Rimbaud was held at the West Street Federal Detention Headquarters in New York City, where, by coincidence, Flores was briefly detained at the same time (Tr. 134–136). Flores repeatedly, although unsuccessfully, attempted to learn the identity of Rimbaud's French supplier. Following his release, Flores persisted in his inquiry through petitioner, an attorney whom Flores had retained to represent Rimbaud (Tr. 136–138, 150). During subsequent interviews with Rimbaud, who remained incarcerated, petitioner was unable to discover the identity of the French supplier. Rimbaud's intransigence hinged on his hope of raising bail (set at $75,000) and resuming his central role in the narcotics operation (Tr. 142–143).

As part of his plan to raise the bail money, Rimbaud enlisted petitioner's assistance in smuggling unsealed letters in and out of the detention center (Tr. 141–142). Petitioner was careful to emphasize to Rim-

baud the need for caution in this undertaking (Tr. 139). The letters smuggled out of the center by petitioner were addressed to Jean Dieupart, a French associate of Rimbaud, and outlined a plan to smuggle two kilograms of heroin into the United States, secreted inside ski poles. The scheme ended in failure, however, when the police seized the ski poles (Tr. 144–150).

Resigned to continued imprisonment, Rimbaud agreed to divulge the name of his supplier to Flores. Petitioner then smuggled out of the detention center another letter from Rimbaud that instructed Dieupart to connect Flores with the French supplier (Tr. 151). This letter, like the ones that previously had been smuggled in and out of the detention center, was unsealed, and its contents were discussed by Rimbaud and petitioner (Tr. 151–153). At this time Rimbaud also agreed to pay petitioner an additional $7,500 for "legal" services rendered, Flores having already made an initial payment of $1,000. Petitioner was informed that Dieupart would pay the "legal fee." Thereafter, Flores and petitioner journeyed to France. Upon his return, petitioner reported to Rimbaud that Flores had made contact with Rimbaud's French supplier and that he had received his "legal fee" (Tr. 150–154). Flores subsequently conducted an extensive narcotics trade directly with Rimbaud's former supplier in France. The series of shipments comprising this trade continued until 1971 (Tr. 397–403).

ARGUMENT

1. Petitioner's claim that there was insufficient evidence to establish his participation in the conspiracy is without merit. Petitioner does not, in support of

this claim, provide any analysis of the evidence introduced (or lacking) at trial, apparently being content with the assertion that he "has been a respected member of the legal community and is a practicing attorney at law at the time that this petition is being prepared" and with the characterization of his role as that of "a mere casual facilitator" (Pet. 14). At the same time, however, petitioner admits that it was Flores who originally arranged to have him represent Rimbaud and that he had "pressed Rimbaud to divulge the name of his French source for narcotics" (Pet. 5). Petitioner offers no explanation in his petition for his desire to know who Rimbaud's supplier in France had been; the jury apparently believed, with substantial justification, that petitioner desired the information so that he could convey it to Flores.

In rejecting petitioner's challenge to the sufficiency of the evidence, the court of appeals found (Pet. App. 12a–13a):

> * * * [Petitioner] did not limit himself to the performance of legal services. Indeed his efforts were devoted for the most part to unlawful efforts to carry out the conspiracy. From the outset, using his access as attorney to see his client Rimbaud at West Street, where Rimbaud was held, [petitioner] sought to extract from Rimbaud the name of his French source so that Flores might continue the drug operation despite Rimbaud's incarceration. When Rimbaud, hoping to gain release on bail, balked at making the disclosure, [petitioner] agreed to assist him in an attempt to raise bail money by smuggling letters in and out of West Street

> for Rimbaud. The letters, apparently written in French but unsealed, were used to hatch and implement a plan for smuggling heroin into the United States in ski poles, with the proceeds from the sale of the heroin to be used to furnish bail money for Rimbaud.
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>
> * * * Only because his plan of raising bail money had been foiled by the Government's seizure of the ski poles did Rimbaud agree to give [petitioner] the information that he and Flores sought. Rimbaud then gave [petitioner] an unsealed letter of introduction to his French associate, Jean Dieupart, directing Dieupart to connect Flores with the French supplier, provided Flores would agree to pay a 5% commission to Rimbaud on subsequent transactions. At the same time [petitioner] told Rimbaud that his legal fee would be $8,500 and that Flores had already paid $1,000 toward it. Rimbaud discussed the contents of the letter with [petitioner], assuring him that Dieupart would pay him the remainder of his fee. [Petitioner] and Flores then went to France and upon his return [petitioner] notified Rimbaud that Flores had made his connection with the French source.

As noted above, petitioner admits some of the more crucial of these findings. Ample evidence was introduced at trial to support the jury's verdict. *Glasser* v. *United States*, 315 U.S. 60, 80.

2. Petitioner also contends that the trial court erred in allowing Rimbaud to recount conversations that had taken place between himself and petitioner, because parts of these conversations were aided by a

translator who did not testify at trial.[2] A similar argument was raised and rejected in *United States* v. *Tijerina*, 412 F. 2d 661, 664 (C.A. 10), certiorari denied, 396 U.S. 990. Here, the argument for the admissibility of the translator-assisted statements is even more compelling than it was in *Tijerina*. Hysohion (the translator) mediated the conversations relating to criminal activity between two co-conspirators, acting at their behest. The record does not suggest that the translations were inaccurate or unreliable, and Rimbaud was subjected to rigorous cross-examination regarding the content of the conversations. Nor was Hysohion shown to have a motive for misleading either Rimbaud or petitioner. Indeed, it seems highly doubtful that Hysohion could have successfully misled petitioner and Rimbaud, since Rimbaud testified that petitioner and he were able to communicate sufficiently well unaided that between one-third and two-thirds of the conversations were conducted without Hysohion's assistance (Tr. 307). Furthermore, the conduct of the parties following the conversations was wholly consistent with the substance of Rimbaud's testimony. Cf. *United States* v. *Puco*, 476 F. 2d 1099, 1104 (C.A. 2), certiorari denied, 414 U.S. 844.

This is not therefore a case in which a defendant was implicated at trial by the out-of-court statements of a person whom he was not given an opportunity to confront, in violation of the Sixth Amendment. Petitioner had every opportunity, through cross-

[2] The translator was Christian Hysohion, a confederate in crime with Rimbaud. See *United States* v. *Hysohion*, 439 F. 2d 274 (C.A. 2), for a discussion of their activities.

examination of Rimbaud or through his own testimony, to convince the jury either that he did not understand significant aspects of what was being said to him by Rimbaud or that he was the victim of an erroneous translation. In fact, however, the activities engaged in by petitioner pursuant to Rimbaud's instruction belied any claim that he did not understand those instructions or that he was the victim of an erroneous translation. The fact that some, but not all, of petitioner's conversation with Rimbaud was aided by a translator may go to the weight of the testimony, but it does not affect its admissibility. *United States* v. *Tijerina, supra,* 412 F. 2d at 664.[3]

3. Petitioner also argues that testimony concerning his role in the aborted scheme to import heroin into the United States in ski poles was improperly admitted. Even disregarding petitioner's failure to raise a timely objection to such testimony,[4] his contention is specious. Rather than being an independent event, the incident constituted an integral part of the massive conspiracy to import narcotics with which peti-

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[3] Petitioner's intimation that the conversations were protected by the attorney-client privilege is clearly erroneous. If such a privilege applied to the conversations, it could be claimed only on behalf of the client, not the attorney. Moreover, the privilege does not protect conversations that promote a criminal undertaking.

[4] No objection was raised to testimony relating to the "ski pole" incident until after Rimbaud had recounted the entire plan and petitioner's role in it. Counsel for a co-defendant (Santana) then suggested that the incident might be outside the scope of the conspiracy with which the defendants were charged (Tr. 146). Petitioner subsequently joined in the objection, but after the government made an offer of proof petitioner withdrew his objection (Tr. 147).

tioner was charged. See, *e.g.*, *United States* v. *Agueci*, 310 F. 2d 817, 826–827 (C.A. 2), certiorari denied, 372 U.S. 959.

A nearly identical situation was presented in *United States* v. *Arroyo*, 494 F. 2d 1316 (C.A. 2), certiorari denied, No. 73–1574, October 15, 1974. Also faced with a far-flung narcotics conspiracy, the *Arroyo* court admitted testimony concerning a drug importation scheme designed to facilitate a jailed co-conspirator's release and an alternate plan to assist his escape. As here, an attorney was convicted for his role in coordinating the plans. Both incidents were found to have been in furtherance of a single, broad conspiracy. *United States* v. *Arroyo*, *supra*, 494 F. 2d at 1317–1319.[5]

5. Finally, petitioner challenges the use at trial of certain admissions that he made during a visit to the United States Attorney's office. The facts relating to this challenge were succinctly set forth by the court of appeals (Pet. App. 15a):

[5] The failure of the "ski pole" incident was also relevant in explaining the events that followed. The timing of Rimbaud's disclosure of his source of supply, petitioner's trip to France, and the subsequent emergence of Flores as the central figure in the conspiracy circumstantially point to petitioner's knowing participation in the conspiracy. See *United States* v. *Miller*, 478 F. 2d 1315, 1317 (C.A. 2), certiorari denied, 414 U.S. 851. Moreover, petitioner's prior participation in a similar scheme was probative of his knowledge and intent in assisting Flores to uncover Rimbaud's supplier. *United States* v. *Catalano*, 491 F. 2d 268, 275–276 (C.A. 2).

In any event, the court adequately protected petitioner by cautioning the jury that the "ski pole incident is not part of the conspiracy in this indictment and please don't consider the testimony about the ski poles in determining the guilt or innocence of any of these defendants" (Pet. App. 12a).

> [Petitioner] had been subpoenaed to appear before a grand jury investigating a narcotics case. He arrived too late to appear before the grand jury and went instead to the office of the Assistant United States Attorney handling the case. There he pressed the Assistant to tell him the reason for the subpoena. The Assistant advised him that he did not have to say anything and that he might be indicted on the matter then pending before the grand jury. [Petitioner] insisted that he was anxious to cooperate. The Assistant then asked him whether he knew that it was a crime to smuggle letters from West Street and whether he had in fact smuggled any letters from there. [Petitioner] replied that he had. After being fully advised of his rights, [he] answered further questions concerning his role in the Flores case. At trial on the conspiracy charge the prosecutor introduced these admissions in evidence against [petitioner].

Petitioner now contends that he was "lulled" into making incriminating statements because the prosecutor did not advise him that he was already under a sealed indictment in the present narcotics conspiracy.[6] Neither petitioner's argument nor his reliance on *Spano* v. *New York*, 360 U.S. 315, is persuasive.[7] Peti-

[6] None of the sixteen co-conspirators named in the indictment had been apprehended at the time, and disclosure of the existence of the indictment would probably have hampered attempts to apprehend them.

[7] The specter presented in *Spano* of a protracted interrogation of a foreign-born, uneducated, emotionally unstable young man, held incommunicado by a battery of law enforcement officers, presents a stark contrast to the facts presented in the instant case. *Spano* v. *New York*, *supra*, 360 U.S. at 316–319.

tioner, an experienced criminal attorney, was aware of the nature of the investigation being conducted by the government attorney and the grand jury; he was apprised of his potential liability in the case; and, finally, he was advised of his right not to incriminate himself. Despite this, petitioner freely elected to admit that he had smuggled letters out of the West Street Federal Detention Headquarters, a felony for which he could have received ten years' imprisonment and been disbarred. See 18 U.S.C. 1791. Far from being a case in which admissions were made involuntarily, the record demonstrates "a calculated effort [by petitioner] to exculpate himself from the more serious narcotics charge" (Pet. App. 16a). As such, it cannot be said that the non-disclosure of the sealed indictment led to a deprivation of due process. See *United States* v. *Diggs*, 497 F. 2d 391, 393 (C.A. 2), certiorari denied, No. 73-6831, October 15, 1974.

[*] At trial, petitioner's admissions were received without objection (Tr. 562-568). Petitioner himself subsequently introduced into evidence portions of a report written by the agent who had witnessed his admissions, on the theory that his statements were exculpatory rather than incriminating (Tr. 573-574). Following the denial of his pretrial motion to suppress, petitioner also freely admitted to the court that he had smuggled letters in and out of the detention center (H. 52).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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